

1 GLYNN & FINLEY, LLP  
2 CLEMENT L. GLYNN, Bar No. 57117  
3 ADAM FRIEDENBERG, Bar No. 205778  
4 One Walnut Creek Center  
5 100 Pringle Avenue, Suite 500  
Walnut Creek, CA 94596  
Telephone: (925) 210-2800  
Facsimile: (925) 945-1975  
Email: [cglynn@glynnfinley.com](mailto:cglynn@glynnfinley.com)  
[afriedenberg@glynnfinley.com](mailto:afriedenberg@glynnfinley.com)

6 Attorneys for Defendant and Counter-Plaintiff  
7 ConocoPhillips Company

11 HOUTAN PETROLEUM, INC. ) Case No. 3:07-cv-5627 SC  
12 Plaintiff, )  
13 vs. )  
14 CONOCOPHILLIPS COMPANY, a Texas ) Trial Date: August 18, 2008  
corporation and DOES 1 through 10, ) Time: 10:00 a.m.  
15 Inclusive ) Courtroom: 1  
16 Defendants. ) Before: Hon. Samuel Conti  
17 )

18 Pursuant to the Court's July 25, 2008 Order, Defendant and Counter-Plaintiff  
19 ConocoPhillips Company ("ConocoPhillips") submits this trial brief.

20 I. INTRODUCTION

21 Plaintiff's Complaint alleges a claim for relief under the Petroleum Marketing  
22 Practices Act, 15 U.S.C. § 2801, *et seq.* ("PMPA"), and a redundant declaratory relief claim. On  
23 both counts, Plaintiff Houtan Petroleum ("Houtan") contends that ConocoPhillips violated the  
24 PMPA by: 1) terminating the parties' franchise relationship for an improper reason; 2) providing  
25 untimely notice of termination; 3) imposing an impermissibly short time for acceptance in its  
26 offer to sell its equipment and improvements at the station to Houtan; and 4) making an offer that  
27 was not "bona fide" under the PMPA. The Court has granted summary judgment in  
28 ConocoPhillips' favor on the first three of these claims; only the fourth remains for trial.

1                   The evidence will show that ConocoPhillips made a “bona fide” offer to sell its  
 2 equipment and improvements under the PMPA (i.e., an offer for a price that “approached fair  
 3 market value”). The offer was based on a competent appraisal prepared in advance of the offer  
 4 by an independent, third-party appraisal firm. ConocoPhillips will establish by this appraisal, as  
 5 well as the expert opinion testimony of a second appraiser, that the offer amount indeed  
 6 approached fair market value as required under the PMPA.

7                   Houtan contends that the offer was not bona fide. But this contention is based  
 8 entirely on the opinion of Houtan’s litigation appraiser, who opines that market and  
 9 neighborhood conditions require that the improvements be demolished and the equipment  
 10 destroyed within 3-5 years so that Plaintiff may rebuild a new station. Houtan’s appraiser admits,  
 11 however, that the current property will be commercially usable for many more years than that.  
 12 Thus, Plaintiff’s true request is not for an offer that is fair but for one it cannot refuse. The  
 13 PMPA requires no such thing of ConocoPhillips.

14                   ConocoPhillips’ counterclaims seek only the return of its property and the lost  
 15 rental value resulting from Houtan’s wrongful refusal to return this property, and other  
 16 appropriate remedies. In denying Houtan’s request for injunctive relief, the Court explicitly  
 17 declined to order ConocoPhillips to leave this property at the station absent payment of fair  
 18 rental. Yet, displaying a cavalier contempt for the Court and its orders, Houtan has refused to  
 19 purchase, pay rent or return the property. Instead, it has resorted to self-help in defiance of the  
 20 law.

21                   **II. FACTUAL BACKGROUND**

22                   ConocoPhillips has elsewhere briefed the full factual history of this matter and the  
 23 parties’ relationship (see, e.g., Docket Nos. 11, 28, 95.) We address here only those facts directly  
 24 relevant to the issues remaining for trial.

25                   **A. The Bona Fide Offer**

26                   On October 18, Houtan demanded that ConocoPhillips offer to sell Houtan all of  
 27 the structures, improvements and equipment at the Station. (Docket No. 5, Ex. D.) Five days  
 28 later, on October 23, 2007, ConocoPhillips hand delivered such an offer to Houtan (the “Bona

1 Fide Offer"). The Bona Fide Offer was based on an independent appraisal prepared by a licensed  
 2 third-party appraiser. (Docket No. 3, ¶ 7, Ex. E.) This appraisal was prepared not in anticipation  
 3 of litigation -- as was the appraisal on which Plaintiff will rely solely -- but as part of  
 4 ConocoPhillips' evaluation of service station assets in the ordinary course of business.

5       **B.     Houtan Prevents ConocoPhillips From Complying With Its Obligations  
 6                   Under the Ground Lease**

7                   Houtan rejected the Bona Fide Offer on October 29, 2007. (Docket No. 3, ¶ 8.)  
 8 Under the Ground Lease, ConocoPhillips had less than two weeks left to remove its structures,  
 9 improvements and equipment from the Station premises. (*Id.*) It was therefore critical that  
 10 ConocoPhillips promptly commence removal operations to ensure timely removal and prevent a  
 11 forfeiture of its property. Houtan, however, refused to allow ConocoPhillips to access the Station  
 12 Property for this purpose.

13       **C.     The Court Denies Plaintiff's Request For Preliminary Injunctive Relief**

14                   Shortly thereafter, Houtan commenced this action, seeking a preliminary  
 15 injunction to compel ConocoPhillips to continue to supply fuel to the Station and to refrain from  
 16 removing its equipment and improvements. The Court denied injunctive relief, finding "that  
 17 there are not sufficiently serious questions going to the merits of Houtan's claim that Conoco  
 18 failed to give the requisite notice of termination" (Docket No. 18 at 12:15-18) and that "the  
 19 parties' disagreement as to the value of the equipment and improvements is not grounds for a  
 20 preliminary injunction" (*Id.* at 14:11-12).

21       **D.     ConocoPhillips Makes, And Plaintiff Rejects, Several Offers To Leave The  
 22                   Equipment And Improvements At The Station *Pendente Lite***

23                   Prior to the litigation, ConocoPhillips offered to leave its equipment and  
 24 improvements at the Station pending the parties' resolution or litigation of their value. Even  
 25 after Plaintiff moved for injunctive relief, ConocoPhillips remained willing to make such an  
 26 accommodation, as it made clear in its opposition and as the Court recognized in its order  
 27 denying injunctive relief. (Docket No. 18 at 16:7-14, 18:12-15.) As the Court acknowledged,  
 28 however, ConocoPhillips' willingness to enter such an interim agreement was contingent on the

1 parties' agreement to: (1) an appropriate interim rental payment by Houtan; (2) an allocation of  
 2 responsibility for environmental compliance and other maintenance and repair obligations; and  
 3 (3) an appropriate manner and time for removal in the event Houtan ultimately declines to  
 4 purchase this property. (Docket No. 18 at 16:7-14.) Houtan has refused to enter into such an  
 5 interim agreement, but instead retains and continues to use ConocoPhillips' equipment without  
 6 paying rent. Houtan has issued itself the very injunctive relief this Court denied.<sup>1</sup>

7 **III. ISSUES FOR TRIAL: Houtan's Claim For Relief**

8 The Court has already ruled that “[t]he only issue remaining in this case is  
 9 whether the price at which Conoco offered to sell the equipment and improvements to Houtan  
 10 was bona fide” (and, if so, whether Houtan is liable to ConocoPhillips for damages). (Docket  
 11 No. 103 at 20:3-8.) The Court has granted summary judgment in ConocoPhillips' favor on all  
 12 other issues. (*Id.* at 11:8-11, 13:2-6, 19:11-13.)

13 **A. The Evidence Will Show That ConocoPhillips Made A “Bona Fide Offer” To  
 14 Sell Its Equipment and Improvements To Houtan.**

15 The standard for determining whether an offer is “bona fide” under the PMPA  
 16 was addressed in *Anand v. BP West Coast Products LLC* 484 F. Supp. 2d 1086 (C.D. Cal. 2007).

17 Whether a bona fide offer has been made is measured by an objective market  
 18 standard. To be objectively reasonable, an offer must approach fair market  
 19 value. To that end, the offering price should reflect what a willing purchaser  
 20 would pay for the fee title of the land, the improvements and the equipment of a  
 21 terminated franchise. The offering price need not be the actual fair market  
value of the property, however, because if courts had to determine whether the  
 22 distributor's offer *actually* was at fair market value, distributors could rarely rest  
 comfortably that their offer would eventually be determined by the court to be fair  
 market value. Accordingly, the fair market value of any one property is a flexible  
 concept, and a range of prices may have a reasonable claim to being [i.e.,  
 approaching] fair market value. . . .

23 a range of prices may reasonably be found to approach fair market value. . . .  
 24 the mere fact that the parties have submitted competing appraisals and/or offers  
 25 does not necessarily preclude the entry of summary judgment in one party's favor.  
 26 This is because an estimation of value almost always involves a conjecture, a  
 27 guess, a prediction, a prophecy. Furthermore, in determining the fair market value  
 28 of a property, no one valuation method is required. Instead, the facts of each  
 individual case will determine what constitutes a bona fide offer.

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<sup>1</sup> Houtan has indicated a willingness to rent the property for some indefinite period, beyond the conclusion of the litigation. Such a resolution is not required or authorized under the PMPA (or otherwise).

1     *Id.* at 1096-97 (internal quotation marks, brackets and citations omitted; original and added  
 2     emphasis). “Congress’ use of the term ‘bona fide’ rather than ‘fair market value’ in the statute  
 3     indicates a recognition that the word ‘value’ almost always involves a conjecture, a guess, a  
 4     prediction a prophesy. [T]here is no universally infallible index of fair market value.” *Harara v.*  
 5     *ConocoPhillips Co.*, 377 F. Supp. 2d 779, 788 (N.D. Cal. 2005) (internal quotation marks and  
 6     citations omitted).

7                 The “range of prices” that “may reasonably be found to approach fair market  
 8     value” may reflect a differential of 20 percent or more. *Anand*, 484 F. Supp. 2d at 1096-98  
 9     (“differences ‘as much as 20 percent or more’ could separate two competent appraisals”); *see*  
 10    *also, Rhodes v. Amoco Oil Co.*, 143 F.3d 1369, 1374 n. 5 (10th Cir. 1998) (“properties are often  
 11    sold at 15% to 20% over the appraised price; . . . two appraisers attempting to estimate fair  
 12    market value should reach results within 10% to 15% of each other; and . . . the expected  
 13    variation between appraisals could be greater when using the replacement cost approach”)  
 14    (internal citation omitted). Thus, even where a franchisor’s PMPA offer to sell a station property  
 15    to its franchisee is significantly higher than an alternative competent valuation, the offer may  
 16    nevertheless *approach* fair market value and be adjudicated “bona fide” as a matter of law.

17                 Here, ConocoPhillips made its offer (\$340,000) based on an appraisal prepared by  
 18    an independent, third-party appraiser. Houtan has retained a litigation appraiser, who reaches a  
 19    different conclusion regarding value (\$145,000). That conclusion presumes, however, that the  
 20    station must be totally demolished and re-built within 3-5 years. The record supports no such  
 21    conclusion. Rather, as ConocoPhillips will establish by expert and percipient testimony, the  
 22    equipment and improvements remain commercially valuable and will for many years.

23                 **B.     Houtan Cannot Establish Any Recoverable Damages**

24                 As noted in ConocoPhillips’ Motion in Limine No. 1, Plaintiff has acknowledged  
 25    that the Court’s grant of partial summary judgment in ConocoPhillips’ favor precludes any claim  
 26    for damages by Plaintiff. Even had Plaintiff not so conceded, neither actual nor punitive  
 27    damages would be recoverable as a matter of law.

28

1           Indeed, the only damage Plaintiff has ever claimed in this case was lost revenue claimed  
 2 to have been caused by the allegedly unlawful termination of his franchise. As the Court has  
 3 already determined, as a matter of law, that the franchise termination was not unlawful, Plaintiff  
 4 cannot recover damages allegedly caused by the termination. Moreover, as a matter of law  
 5 damages are unavailable under the PMPA where, as here, the franchisee remains in possession of  
 6 the station property pending litigation. *See, e.g., Chevron U.S.A., Inc. v. El-Khoury*, 202 WL  
 7 31256160, \*2 (C.D. Cal. 2002); *Blankenship v. Knox Oil Co.*, 548 F. Supp. 789 (E.D. Tenn.  
 8 1982) (“Plaintiff has had possession of the premises and has continued to operate the service  
 9 station. He has, therefore, suffered no damages”); *see also Clark v. Mobil Oil Corp.*, 496 F.  
 10 Supp. 132, 136 (E.D.Mo. 1980); *Noe v. Mobil Oil Corp.*, 503 F. Supp. 213, 216 (E.D.Mo. 1980).

11           Plaintiff’s apparently also acknowledge the absence of any basis for punitive  
 12 damages. The PMPA permits such an award only where the franchisor acted in “willful  
 13 disregard” of the franchisee’s rights (i.e., with consciousness, or guilty knowledge, that it was  
 14 violating the PMPA). *See* 15 U.S.C. § 2805(d)(1)(B); *Eden v. Amoco Oil Co.*, 741 F. Supp.  
 15 1192, 1193-95 (D. Md. 1990). ConocoPhillips’ reliance on a legitimate appraisal in making the  
 16 offer demonstrates that it acted in good faith in ascertaining the offer price. *Cf. Jones v. Crew  
 17 Distributing Co., Inc.*, 984 F.2d 405, 409 (11th Cir. 1993) (evidence that franchisor sought legal  
 18 advice prior to termination proof of lack of “willful disregard” of the law).

19 **IV. ISSUES FOR TRIAL: ConocoPhillips’ Counterclaims**

20           ConocoPhillips has asserted three counterclaims: (1) breach of contract; (2)  
 21 conversion; and (3) unjust enrichment. Each of these counterclaims are based on the fact that  
 22 after ConocoPhillips terminated the franchise, Houtan wrongfully retained possession of  
 23 ConocoPhillips’ pumps, storage tanks, buildings and other property at the service station without  
 24 paying any rent for their use. That unauthorized use continues to this moment.

25           **A. Liability**

26           **1. Breach of contract**

27           The elements for a breach of contract are: (1) the existence of a contract, (2)  
 28 plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) damages.

1     *Acoustics, Inc. v. Trepte Construction Co.*, 14 Cal.App.3d 887, 913 (1971). Here, there is no  
 2     dispute that ConocoPhillips and Houtan entered into the Franchise Agreement. As the issue has  
 3     been summarily adjudicated in ConocoPhillips' favor, there can also be no dispute that  
 4     ConocoPhillips performed all of its obligations under the Franchise Agreement until its  
 5     termination on October 31, 2007. Termination of the Franchise Agreement on October 31, 2007  
 6     based on the nonrenewal of the Ground Lease was specifically provided for in Addendum 1 to  
 7     the Franchise Agreement, which was initialed by Houtan's President.

8                 The Franchise Agreement further provides that “[a]t the expiration, nonrenewal or  
 9     earlier termination of this Agreement, DEALER shall yield immediate and peaceable possession  
 10    of the Station to CONOCOPHILLIPS. . . .” (Docket No. 5 at 25 (¶ 32).) It is undisputed that  
 11    Houtan breached this provision of the Franchise Agreement by refusing to permit ConocoPhillips  
 12    to recover its equipment and improvements. Houtan's wrongful retention of the property has  
 13    damaged ConocoPhillips in that it no longer enjoys the use of its property, it is unable to sell the  
 14    property to third parties, the property continually depreciates in value while it is out of  
 15    ConocoPhillips' possession and ConocoPhillips is potentially subject to expensive environmental  
 16    litigation and administrative action because it is unable to monitor the condition and performance  
 17    of the property, including the underground storage tanks. Houtan's actions constitute multiple  
 18    breaches of the Franchise Agreement.

19                 **2.     Conversion**

20                 “Conversion is the wrongful exercise of dominion over the property of another.  
 21    The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of  
 22    the property; (2) the defendant's conversion by a wrongful act or disposition of property rights;  
 23    and (3) damages. Conversion is a strict liability tort. The foundation of the action rests neither  
 24    in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an  
 25    absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's  
 26    good faith, lack of knowledge, and motive are ordinarily immaterial.” *Burlesci v. Petersen*, 68  
 27    Cal.App.4th 1062, 1066 (internal citations omitted) (1998).

28

1                   The present case is a hornbook example of conversion. There is no dispute that  
 2 ConocoPhillips owns the pumps, storage tanks, buildings and other property at the service  
 3 station. It is also undisputed that Houtan's wrongful retention of the property has damaged  
 4 ConocoPhillips, as discussed above. Houtan attempted to get a preliminary injunction requiring  
 5 ConocoPhillips to leave the property in place. Even though the Court denied the injunction  
 6 Houtan has refused to surrender the property to ConocoPhillips, or to enter into an interim  
 7 arrangement. Houtan has simply flouted the Court's order and ConocoPhillips' property rights.  
 8 Such conduct is a conversion of ConocoPhillips' property.

9                   **3.        Unjust enrichment**

10                  An individual is required to make restitution where he is unjustly enriched at the  
 11 expense of another. *Ghirardo v. Antoniolo*, 14 Cal.4th 39, 51 (1996). "A person is enriched if  
 12 he receives a benefit at another's expense. [Citation.] The term 'benefit' 'denotes any form of  
 13 advantage.' [Citation.]" *Id.* Here, Houtan has been unjustly enriched by wrongfully retaining  
 14 and using ConocoPhillips' property, including pumps, underground storage tanks, etc., without  
 15 paying any compensation to ConocoPhillips. Both of these activities caused damage to  
 16 ConocoPhillips as discussed above.

17                  **B.        Remedies**

18                  **1.        Breach of contract.** California Civil Code section 3300 states: "[f]or the  
 19 breach of an obligation arising from contract, the measure of damages, except where otherwise  
 20 expressly provided by this code, is the amount which will compensate the party aggrieved for all  
 21 the detriment proximately caused thereby, or which, in the ordinary course of things, would be  
 22 likely to result therefrom."

23                  Since October 31, 2007, Houtan has wrongfully retained possession of  
 24 ConocoPhillips' property. ConocoPhillips is entitled to an injunction forcing Houtan to return  
 25 the property, and reasonable rent for the period of time Houtan retained the property without  
 26 paying rent. ConocoPhillips will present evidence at trial that \$4,000 per month is a reasonable  
 27 amount of rent. ConocoPhillips will also seek interest on the amount of rent due under  
 28 California Civil Code section 3287.

1                   Paragraph 48 of the Franchise Agreement, entitled "Attorney Fees," provides that  
 2    "[i]n the event an action is brought to enforce or interpret this Agreement, the prevailing party  
 3    shall be entitled to reimbursement of all costs including, but not limited to, reasonable attorney  
 4    fees and costs incurred." (Docket No. 5, Ex. A.) ConocoPhillips will seek its reasonable  
 5    attorney fees and costs incurred in the prosecution of its counterclaims and defense of Houtan's  
 6    PMPA claims pursuant to the Franchise Agreement.

7                   **2. Conversion.** California Civil Code section 3336 states:

8                   The detriment caused by the wrongful conversion of personal property is presumed to be:  
 9                   First—The value of the property at the time of the conversion, with the interest from that  
 10                  time, or, an amount sufficient to indemnify the party injured for the loss which is the  
 11                  natural, reasonable and proximate result of the wrongful act complained of and which a  
 12                  proper degree of prudence on his part would not have averted; and  
 13                   Second—A fair compensation for the time and money properly expended in pursuit of the  
 14                  property.

15                  Houtan converted ConocoPhillips' property on October 31, 2007. The value of  
 16                  the property at the time of the conversion was approximately \$340,000 based on ConocoPhillips'  
 17                  independent appraisal. Houtan may either pay ConocoPhillips \$340,000 plus interest and keep  
 18                  the property, or return the property and pay ConocoPhillips reasonable rent from October 31,  
 19                  2007 to the present to indemnify ConocoPhillips for the conversion. ConocoPhillips will also  
 20                  seek interest on the amount of rent due pursuant to California Civil Code section 3288.

21                  In light of the Court's rejection of Houtan's request for injunctive relief, Houtan's  
 22                  conversion of ConocoPhillips' property was willful. ConocoPhillips is therefore entitled to  
 23                  exemplary damages pursuant to California Civil Code section 3294.

24                   **3. Unjust enrichment.** ConocoPhillips is entitled to restitution of the amount  
 25                  Houtan has been unjustly enriched at its expense. *Ghirardo, supra*, 14 Cal.4th at p. 51. Houtan  
 26                  has wrongfully retained and used ConocoPhillips' property since October 31, 2007.  
 27                  ConocoPhillips is entitled to return of its property and reasonable rent, with interest, for the  
 28                  period of time Houtan retained the property without paying rent. Moreover, ConocoPhillips is  
 29                  ///  
 30                  ///

1 entitled to disgorgement of all profits Houtan has received from its use of the equipment and  
2 improvements. *See County of San Bernardino v. Walsh*, 158 Cal.App.4th 533, 542-43 (2007).

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4 Dated: August 8, 2008

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GLYNN & FINLEY, LLP  
CLEMENT L. GLYNN  
ADAM FRIEDENBERG  
One Walnut Creek Center  
100 Pringle Avenue, Suite 500  
Walnut Creek, CA 94596

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By   
Attorneys for Defendant and Counter-  
Plaintiff ConocoPhillips Company